Supreme Court, U.S.
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No. 98-1862

In The

Supreme Court of the United States

RICHARD L. GORDON,

Petitioner,

vs.

COMMUNITY FIRST BANK OF NEBRASKA (formerly THE ABBOTT BANK), RICHARD J. CHAPIN, DARRELL RAUM, PAT KESLAR and TOM WILLNERD, JAMES A. HANSEN, LUCINDA GLEN, and KENT PLUMMER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nebraska

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The Petitioner frames one issue for review which mischaracterizes the issues determined by the courts below. There are three issues which could be presented for review.

1. Do loss of employment and injury to reputation of themselves constitute a liberty interest protected under the Fourteenth Amendment when the Petitioner has availed himself of and received procedural safeguards required by the Due Process Clause?

2. Is a causal relationship established between the State Officials' issuance of cease and desist orders and Petitioner's loss of private employment when the orders and the State Officials' actions neither directed nor required severance of Petitioner's employment relationships?

3. Are the Director, agency counsel, and a review examiner of the Department of Banking and Finance, State of Nebraska ("State Officials"), absolutely immune from personal liability for their actions undertaken in the context of quasi-judicial proceedings before the state regulatory agency?

LIST OF PARTIES

Respondents accept the Petitioner's designation of parties to the proceeding in the Petition.

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STATUTES

42 U.S.C. § 1983 ..... *passim*

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OPINIONS BELOW

The opinion of the Nebraska Supreme Court, reported at 255 Neb. 637, 587 N.W.2d 343 (1998), is reprinted in the Appendix to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTES INVOLVED IN THIS CASE

This case involves application of the provisions of 42 U.S.C. § 1983 and Nebraska statutes relating to powers and authority of the Director of the Department of Banking and Finance as well as civil and appellate procedure. The text of these provisions are reprinted in the Petition. (Pet. Cert. App. 53-68).

Additional pertinent provisions of Nebraska statutes are set forth in Neb. Rev. Stat. § 8-139 (1997):

> **Executive officers; approval of loans and investments; qualifications; license; revocation; regulations; forms; violations; penalty.** No loan or investment shall be made by a bank, directly or indirectly, without the approval of an active executive officer. Executive officers of banks shall be persons of good moral character, known integrity, business experience and responsibility, and be capable of conducting the affairs of a bank on sound banking principles. No person shall act as an active executive officer

of any bank until such bank shall apply for and obtain from the department a license for such person to so act. If the department, upon investigation, shall be satisfied that any active executive officer of a bank is conducting its business in an unsafe or unauthorized manner, or is endangering the interests of the stockholders or depositors, the department shall have authority to revoke such license. Any person who shall act or attempt to act as an active executive officer of any bank, except under a license from the department, or anyone who shall permit or assist such person to act or attempt to act as such, shall be guilty of a Class III felony. The department may make and enforce reasonable regulations and prescribe forms to be used to carry out the intent of this section.

STATEMENT OF THE CASE

The Nebraska Supreme Court [hereinafter "State Court"] recognized that the Petitioner failed to plead due process violations contrary to Petitioner's assertions. The State Court, construing the allegations in a light most favorable to the Petitioner, concluded that the Petition does not contain factual allegations sufficient to state a cause of action under § 1983 because it does not allege a deprivation of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States. (Pet. Cert. App. 25).

The Petitioner, Richard L. Gordon, initially commenced this action in the District Court for Douglas County, Nebraska, against the Community First Bank,

formerly the Abbott Bank, in February 1996, asserting various causes of action including civil rights violations under § 1983. Through subsequent amendment, additional Defendants, Richard J. Chapin, Darrel Raum, Pat Keslar and Tom Willnerd, former officers of the Abbott Bank, were named in June 1996. A Third Amended Petition was filed in June 1997, and a Fourth Amended Petition in August 1997, adding James A. Hansen, Lucinda Glen, and Kent Plummer (the "State Officials") as parties Defendant in the proceeding before the district court.

Upon Demurrers filed by all Defendants, the district court dismissed Gordon's Fourth Amended Petition with prejudice for failure to state a cause of action under § 1983. In affirming the decision of the district court, the State Court observed:

> However, the only factual allegations pertaining to conduct directed at Gordon by the individual officers and the state regulators are (1) the issuance of an emergency order of the Department requiring Gordon to cease and desist from "managing, controlling, or otherwise interfering with any aspect of the ongoing business" of the Bank and (2) the subsequent termination of the attorney-client relationship between the Bank and Gordon's law firm, as a result of which Gordon alleges to have "lost his position" with the firm.

(Pet. Cert. App. 24).

The State Court also acknowledged, while the states have concurrent jurisdiction to entertain § 1983 actions, federal law is controlling. (Pet. Cert. App. 23). From this

decision, Plaintiff Gordon petitioned for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the rules of this Court. Respondents respectfully submit the Petition should be denied.

I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

Petitioner's only argument as to why the Court should accept this case and reverse the State Court is that the decision below erroneously applied federal authorities. This assertion is without merit because the State Court appropriately relied on federal case authority and acknowledged that federal authorities are controlling in considering § 1983 claims.

Importantly, Petitioner's argument fails to address causation and ignores the factual basis of the State Court's decision. Even if Petitioner has demonstrated a liberty or property interest in his prior employment relationships, it must also be proved that he was deprived of such an interest without due process of law.

Finally, Petitioner does not address other significant issues relevant to the case regarding the nature of the conduct of the State Officials, and whether State Officials are absolutely immune from personal liability for actions

undertaken in quasi-judicial proceedings before a state agency.

A. The Decision of the Nebraska Supreme Court is Consistent with Controlling Federal Case Authority Governing § 1983 Claims.

The State Court appropriately relied on *Sigert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Lynch v. City of Boston*, 989 F. Supp. 275 (D. Mass. 1997) in reaching its decision that the facts alleged failed to establish the violation of any constitutional right.

Petitioner's arguments ignore the analysis required to establish a substantive or procedural due process violation. Under § 1983 jurisprudence, a plaintiff must first demonstrate that he has a protected liberty interest or property interest to establish a due process violation. *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); *Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453 (8th Cir. 1996); *Batra v. Board of Regents of Univ. of Neb.*, 79 F.3d 717 (8th Cir. 1996). Second, a plaintiff must prove that he was deprived of such an interest without due process of law. *Id.*

Under the facts alleged, it is apparent that Gordon received the procedural safeguards required by the Due Process Clause. Gordon requested and received a hearing before the Nebraska Department of Banking and Finance (the "Department") contesting the cease and desist orders. (Pet. Cert. App. 41). And, the Petitioner appealed the Department's orders to the District Court of Lancaster

County, Nebraska. (Pet. Cert. App. 43). Thus, the Petitioner has fully availed himself of and received the procedural safeguards required by the Due Process Clause.

That the State Court decided the case consistent with controlling federal authority is most compellingly demonstrated by the decision reached by the United States Court of Appeals in *Gordon v. Hansen*, reported at 168 F.3d 1109 (8th Cir. 1999) (reh. denied at ___ F.3d ___ (8th Cir. 1999) reprinted in the Appendix (App. 1, 14). The Petitioner instituted the action in the United States District Court for the District of Nebraska asserting the same causes of action based on essentially the same set of facts against the State Official Respondents and two officials of the Federal Deposit Insurance Corporation. The district court held that Gordon failed to state a substantive due process claim for which relief could be granted and that the State Officials were subject to absolute immunity on certain procedural due process claims and that Gordon failed to state a claim on the other procedural due process claims. (App. 2). The Court of Appeals reached the same conclusion in affirming the decision of the district court as the State Court and stated:

> Even if we were to assume that Appellees' investigation of Gordon was motivated by malice, such facts would only give rise to a claim for malicious prosecution which is not punishable under section 1983, or *Bivens*, because it does not allege a constitutional injury. *See Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990). Moreover, we find that Appellees did not order the termination of Gordon's employment as general counsel with the Bank or as a partner

> with MNM & K; rather, Appellees merely prohibited Gordon from acting as an unlicensed executive officer, which Gordon had no legal right to do. Thus, Appellees' orders did not cause Gordon's claimed injury: loss of employment. These allegations fail to establish a causal link between the alleged wrongful action and deprivation and, therefore, fail to state a section 1983, or *Bivens*, claim for violation of Gordon's substantive due process rights. *See Madewell*, 909 F.2d at 1208.

(App. 9).

The State Court also observed that a causal connection between the State Officials' alleged wrongful conduct and the alleged deprivation is not demonstrated. The State Court noted that the only factual allegations pertaining to conduct directed at the State Officials are, (1) the issuance of an emergency order of the Department requiring Gordon to cease and desist from managing, controlling, or otherwise interfering with any aspect of the ongoing business and (2) the subsequent termination of the attorney-client relationship between the Bank and Gordon's law firm, as a result of which Gordon claims to have lost his position with the firm. (Pet. Cert. App. 24).

Causation is an essential element of a § 1983 cause of action. *Morton v. Becker*, 793 F.2d 185 (8th Cir. 1986); *Graham v. Baughman*, 772 F.2d 441 (8th Cir. 1985); *Reimer v. Smith*, 663 F.2d 1316 (5th Cir. 1981) (noting that it is axiomatic that a plaintiff cannot succeed in a § 1983 action if he or she fails to demonstrate a causal connection between the state officials alleged wrongful action and the alleged deprivation); *see e.g. Arnold v. International Business Machines Corp.*, 637 F.2d 1350 (9th Cir. 1991)

(causation, while frequently not mentioned, is an implicit requirement in a § 1983 action). If it appears from the complaint, including its reasonable inferences, that there is no causal connection between the alleged deprivations and the challenged conduct, the complaint may properly be dismissed for failure to state a claim. *Hampton v. Mouser*, 701 F.2d 766, 767 n.2 (8th Cir. 1983).

Petitioner's factual allegations, taken as true, do not demonstrate nor show that the State Officials engaged in conduct to remove the Petitioner from employment by the Bank and Petitioner's law firm. The Department's orders required that Gordon not perform bank executive officer duties without licensure required by law for that purpose. There is no statutory or constitutional right for an attorney serving as general counsel to a Bank to also perform executive officer functions without licensure. *Notably, the "Emergency Orders" and the Department's final order did not order or require that Gordon terminate or sever his employment as general counsel of the Bank.* Thus, Petitioner's allegation regarding deprivation of liberty and property rights are unsupported by specific facts describing conduct or incidents in which the State Officials prevented Gordon from continuing his employment activities.

B. The Actions of the State Officials Do Not Rise to the Level of a Constitutional Violation.

The conduct of the State Officials complained of for the most part consists of meeting with bank officers and other regulatory officials, issuance of cease and desist orders prohibiting Petitioner from acting as an unlicensed

executive officer, conduct of administrative proceedings, and a joint examination of the Bank with the Federal Deposit Insurance Company. These actions are not of an egregious nature that rise to the level of a constitutional violation. Actions taken by government officials must be truly irrational to amount to a substantive due process violation. *Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453 (8th Cir. 1996); *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).

This Court has established that it is a function of substantive due process to prevent the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty. *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1986).

To the extent the Petitioner claims a substantive due process violation of a liberty interest, it must be demonstrated that Defendants abused their official power in a manner that shocks the conscience, regardless of whether state remedies are available. *New v. City of Minneapolis*, 792 F.2d 724, 725-26 (8th Cir. 1986). "[T]he theory of substantive due process is properly reserved for truly egregious and extraordinary cases," *Meyers v. Scott County*, 868 F.2d 1017, 1019 (8th Cir. 1989), and it "proscribes 'certain government actions regardless of the procedures used to implement them.' " *Williams-El v. Johnson*, 872 F.2d 224, 228-229 (8th Cir. 1989) *quoting Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986), *cert. denied*, 493 U.S. 871, 110 S. Ct. 199, 107 L. Ed. 2d 153 and 493 U.S. 824, 110 S. Ct. 85, 107 L. Ed. 2d 51 (1989). And, official conduct within the bounds of

reasonableness does not shock the conscience. *Zakrewski v. Fox*, 87 F.3d 1011, 1014 (8th Cir. 1996).

It is apparent that the conduct of the State Officials is within the bounds of reasonableness and the conduct complained of cannot raise to the level of a constitutional violation.

C. Petitioner's § 1983 Claims Against the State Officials are Barred by the Doctrine of Absolute Immunity.

The Petitioner has further failed to state a cause of action under § 1983 for violation of his constitutionally-protected civil rights because the State Officials are entitled to absolute immunity protection. Absolute immunity extends to their participation in the administrative hearing before the Department and the ensuing order affirming the cease and desist orders.

The State Court did not reach the immunity issue in its decision. However, the United States Court of Appeals noted that the State Officials would be entitled to absolute immunity in affirming the decision of the lower court. (App. 12).

It is well established that "judicial, prosecutorial, and legislative functions require absolute immunity," *Harlow v. Fitzgerald*, 457 U.S. 800, 811, 102 S. Ct. 2727, 2734, 73 L. Ed. 2d 396 (1982), and "that neither a state agency nor a state official in his official capacity may be sued for damages in a section 1983 action." *Johnson v. Rodriguez*, 943 F.2d 104, 108 (1st Cir. 1991), *cert. denied*, 502 U.S. 1063, 112 S. Ct. 948, 117 L. Ed. 2d 117 (1992) (*citing Will v.*

Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989)); *see also, Kaimowitz v. Board of Trustees, Univ. of Ill.*, 951 F.2d 765, 767 (7th Cir. 1991).

Importantly, absolute immunity is accorded to government officials who serve in quasi-judicial capacities functionally equivalent to those performed by judges. *Bettencourt v. Board of Registration in Medicine*, 904 F.2d 772 (1st Cir. 1990); *Wang v. New Hampshire Board of Registration in Medicine*, 55 F.3d 698 (1st Cir. 1985). In these cases, the circuit court observed that board members performed judicial functions in weighing evidence and making factual determinations. It is thus necessary to consider the actions of the State Officials complained of in the light of immunity jurisprudence.

It is apparent that Director James Hansen was serving as a decision-maker in a quasi-judicial capacity functionally equivalent to those responsibilities performed by judges. In actuality, the conduct of Respondent Hansen most vigorously complained of by Petitioner is the Director's role in not accepting the recommended findings of the hearing officer. (Pet. Cert. App. 49). There is no requirement that the Director accept *recommended* findings of the hearing officer. It is the Director who is responsible for rendering the decision, and it is clear that reviewing of proposed findings is the performance of a quasi-judicial function.

Significantly, Petitioner does not contend that the actions of Director Hansen were outside the scope of his jurisdiction. A judge will not be deprived of immunity

because the action he took was in error, was done maliciously, or was in excess of authority; rather, he will be subject to liability only when he has acted in clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S. Ct. 1099, 1105, 55 L. Ed. 2d 331 (1978). The conduct complained of for immunity to apply need only be more or less connected to the general matters committed by law to the Department's control or supervision and not manifestly beyond the Department's authority. *See Rickki v. Key Bancshares of Maine, Inc.*, 768 F.2d 456, 462 (1st Cir. 1985).

Respondent Lucinda Glen is entitled to immunity from Plaintiff's § 1983 claims for essentially the same reason Director Hansen is accorded absolute immunity. That is, officials performing special quasi-judicial and prosecutorial functions require a full exemption from liability.

Petitioner's § 1983 claims against Respondent Kent Plummer are also absolutely barred because of his role in the administrative proceedings. It is settled that § 1983 does not authorize damages against persons serving as witnesses in judicial or quasi-judicial proceedings. In *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983), the Court extended the protection of absolute immunity to witnesses. The Court concluded that the rationale supporting absolute immunity for other participants in the judicial process applies with equal force to a testifying witness, since a witness apprehension of subsequent damages liability might lead to a reluctance to testify, or once the witness takes the stand, untruthful testimony. *Id.* at 335-36, 103 S. Ct. at 1115-16. The Court specifically commended that witnesses do represent an

"integral part" of the judicial process and that witnesses are, therefore, absolutely immune from suit. The importance of witness absolute immunity was also recognized in *Murphy v. Morris*, 849 F.2d 1101, 1104 (8th Cir. 1988).

Respondent Kent Plummer's role in the administrative proceedings was that of a witness. Petitioner does not with specificity allege wrongful conduct of this Respondent that rises to a constitutional level other than the generalized fact allegations set forth in the Petition that Emergency Orders were issued without first attempting to investigate and that findings of fact, conclusions of law and order were unsupported by evidence. (Pet. Cert. App. 48). In actuality, the primary function of Respondent Plummer was that of a witness for the Department and this function was an integral part of the administrative proceedings before the Department.

For these reasons, the State Officials are entitled to absolute immunity protection for their participation in the administrative proceedings of a quasi-judicial nature and ensuing order affirming the cease and desist orders. To the extent the conduct of the State Officials fall outside quasi-judicial function, that conduct does not rise to the level of a constitutional violation.

CONCLUSION

Petitioner has sought redress for his alleged injuries in both state and federal courts. The State Court and the United States Court of Appeals for the Eighth Circuit concluded that Gordon failed to state either a substantive or procedural due process claim under § 1983.

Petitioner's asserted ground for review of the decision does not present any substantial or important question necessitating review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

James A. Hansen, Lucinda Glen and Kent Plummer, Respondents,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3657

Richard L. Gordon, Appellant, v. James A. Hansen; Lucinda Glen; Kent Plummer; Richard Anderson; Richard Jarvis, Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska. [PUBLISHED]

Submitted: March 12, 1998
Filed: February 23, 1999

Before MORRIS SHEPPARD ARNOLD and FLOYD R. GIBSON, Circuit Judges, and NANGLE,[1] District Judge.

PER CURIAM.

Richard L. Gordon brought this action against Nebraska state officials, James A. Hansen, the Director of the Nebraska Department of Banking (the "Department"), Lucinda Glen, counsel for the Department, and

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[1] The Honorable John F. Nangle, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

Kent Plummer, a Senior Review Examiner for the Department, to recover monetary damages from each in their individual capacities pursuant to 42 U.S.C. § 1983 (1994). In addition, Gordon asserted constitutional tort claims against Richard Anderson, a Review Examiner in the Division of Compliance and Consumer Affairs of the Federal Deposit Insurance Corporation ("FDIC"), and Richard Jarvis, Assistant Regional Director of the FDIC's Division of Supervision[2] in their individual capacities pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Gordon alleged that Appellees engaged in a conspiracy to deprive him and did deprive him of his constitutional rights to substantive and procedural due process. Upon motions to dismiss filed by Appellees, the district court[3] held that Gordon failed to state a substantive due process claim for which relief could be granted and that the Department officials were subject to absolute immunity on certain procedural due process claims and that Gordon failed to state a claim on the other procedural due process claims. The district court further dismissed without prejudice Gordon's remaining procedural due process claim against the FDIC officials because the underlying administrative action had not concluded in Gordon's favor at the time of the instant action. Gordon appeals this dismissal, and, for the reasons set forth below, we affirm.

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[2] We will refer to both the state and federal defendants collectively as "Appellees."

[3] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

I. BACKGROUND

From early 1987 until March 1994, Gordon served as general counsel for the Community First Bank of Nebraska ("Bank"), formerly known as the Abbot Bank, located in Alliance, Nebraska. Gordon was a member of the law firm McGrath, North, Mullin & Kratz ("MNM & K"). The Bank was chartered by the State of Nebraska and insured by the FDIC.

On January 27, 1994, the Bank's president met with Glen and Plummer to present information and materials to support his allegation that the Bank was in immediate danger of failing because of the majority stockholder's policies and Gordon's implementation of those policies. Anderson and Jarvis participated in the meeting by phone. The owners of the Bank, members of its board of directors, and Gordon were unaware of this meeting. Thereafter, a second meeting was held among Appellees, representatives from the Federal Reserve Bank, the United States Attorney's Office, the Nebraska Attorney General's Office, and the Federal Bureau of Investigation. At this meeting, the FDIC and the Department decided to conduct a joint investigation of the Bank.

In February of 1994, the FDIC issued an order of investigation against the Bank and commenced a joint examination with the Department. Gordon claims that, despite his repeated attempts to gain information about the reason for the investigation, he was denied access to such information. Gordon further contends that, by February 24, 1994, Appellees learned that there was no imminent financial danger to the Bank. Gordon charges that Appellees intentionally disregarded this information and

worked to remove him from his employment with the Bank.

On March 10, 1994, the Department issued an emergency order to the Bank which required that the Bank not terminate any officer or director nor force, require, or coerce any officer or director to resign without the prior approval of the Department and the FDIC. On March 11, 1994, the Department issued a second emergency order to the Bank, its officers, directors, and employees which mandated that the Bank cease and desist from allowing Gordon to act as an executive officer of the Bank. This order determined that Gordon was acting as an unlicensed executive officer in violation of Neb. Rev. Stat. § 8-139 (1997). Thereafter in March of 1994, the Bank terminated its relationship with Gordon and MNM & K and retained new general counsel. Gordon claims that the Department issued these orders in furtherance of its conspiracy with the FDIC to remove him from his position as the Bank's general counsel.

Gordon requested and was granted a hearing on the March 11 emergency order. At the hearing, Gordon and other interested parties appeared and were represented by counsel. After consideration of the parties' briefs and final arguments, the hearing officer submitted his recommended findings and order to the Director of the Department, Hansen, for consideration. The hearing officer determined that Gordon had not acted as an executive officer of the Bank and recommended that the March 11 emergency order be set aside. Following a review of the hearing record, Hansen rejected the hearing officer's recommendation and sustained the March 11 emergency order in the Department's Order of December 22, 1994.

Gordon appealed the Department's Order of December 22 to the District Court of Lancaster County, Nebraska. The District Court of Lancaster County dismissed the appeal as moot because the Bank had been sold in the interim.

On February 28, 1996, the FDIC issued a Notice of Intention to Prohibit from Further Participation; Notice of Assessment of Civil Money Penalties; Findings of Fact and Conclusions of Law; Order to Pay and Notice of Hearing to Gordon and other individuals involved in the Bank's management in 1994. The FDIC based this notice, in part, upon its finding that Gordon had acted as the chief executive officer of the Bank in a manner which violated applicable law and regulations and resulted in loss or risk of loss to the Bank.

On March 8, 1996, Gordon commenced this section 1983 and *Bivens* action[4] in the United States District Court for the District of Nebraska seeking damages from Appellees in their individual capacities for allegedly violating Gordon's constitutional rights under the First,[5] Fifth, and Fourteenth Amendments of the United States Constitution.[6]

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[4] Gordon also filed Nebraska state law claims against Hansen, Glen, and Plummer for abuse of process and intentional interference with a business relationship. After dismissing Gordon's federal claims, the district court declined to retain supplemental jurisdiction over these state law claims.

[5] In his original complaint, Gordon alleged that Appellees denied him his First Amendment rights of freedom of speech and freedom of association. Gordon did not supplement these allegations in his Amended Complaint nor did he appeal their dismissal by the district court.

[6] Specifically, Gordon alleged that Appellees violated his constitutional rights by: (1) depriving him of his right to

Upon motions to dismiss filed by Appellees, the district court concluded that Gordon failed to state a claim upon which relief can be granted for his section 1983 and *Bivens* claims. As such, the district court declined to exercise supplemental jurisdiction over Gordon's state law claims.

On August 22, 1996, Gordon filed an Amended Complaint against Appellees which alleged the same causes of action. The district court, upon considering Appellees' motions to dismiss, found that Gordon's allegations remained insufficient to state a substantive due process claim, that the Department's officials were entitled to absolute immunity on certain procedural due process allegations,[7] and that Gordon failed to state a claim on

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substantive due process by actually or constructively causing his discharge from his general counsel position for the Bank and his discharge as a law partner for MNM & K; (2) causing Gordon to suffer a loss of personal and professional reputation in his community; and (3) depriving Gordon of his rights to procedural due process under the Fifth and Fourteenth Amendments.

[7] Specifically, Gordon alleged that Hansen acted as a quasi-judicial officer in this matter while also issuing and continuing the Emergency Orders, despite knowing that no financial emergency existed at the Bank, and directing the prosecution and investigation of Gordon and the Bank in preparation for the hearing before the hearing examiner. Gordon further claims that Hansen sent information to prospective witnesses to assist the prosecution of the case before the hearing examiner, withheld information from Gordon before and during this hearing, and continues to withhold relevant and discoverable documents in his possession.

the remaining procedural due process allegations.[8] The district court further dismissed without prejudice Gordon's procedural due process claim against the FDIC officials because Gordon can not assert a *Bivens* damages action until the underlying administrative action concludes in Gordon's favor per *Heck v. Humphrey*, 512 U.S. 477 (1994). Gordon appeals the dismissal of his Amended Complaint.

II. DISCUSSION

We review the district court's Rule 12(b)(6) dismissal *de novo*. *See Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998). We will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. *See id.* When analyzing a 12(b)(6) dismissal, we accept the complaint's factual allegations as true and construe them in the light most favorable to the plaintiff. *See id.*

To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution

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[8] Specifically, Gordon alleged that Hansen acted as a quasi-judicial officer in this matter while also initiating the investigation and directing the Department officials in the investigation and prosecution of Gordon and the Bank, and continuing the investigation despite knowing that no financial emergency existed at the Bank. Gordon also claimed that Hansen worked closely with Glen and Plummer in rejecting the hearing examiner's Recommended Findings. In addition, Gordon alleged that Appellees released to the media confidential information gained through the investigatory process.

and laws of the United States. *See Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993). "Section 1983, of course, requires a causal relationship between a defendant's conduct and a plaintiff's constitutional deprivation. Absent such a relationship, the defendant is entitled to dismissal." *Latimore v. Widseth*, 7 F.3d 709, 716 (8th Cir. 1993) (en banc); *see also Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990). "An action under *Bivens* is almost identical to an action under section 1983, except that the former is maintained against federal officials while the latter is against state officials." *Christian v. Crawford*, 907 F.2d 808, 810 (8th Cir. 1990). Because the section 1983 and *Bivens* claims involve the same analysis, we consider them together.

In the present case, we agree with the district court that Gordon cannot assert a section 1983 or *Bivens* claim against Appellees because, accepting Gordon's allegations as true, such allegations are insufficient to state a claim for violating Gordon's substantive due process rights. The Department's issuance of the emergency orders which, in part, mandated that the Bank, its officers, directors, and employees cease and desist from allowing Gordon to act as an unlicensed executive officer, and Appellees continued joint investigation of the Bank after discovering that the Bank was not in immediate danger of financial collapse do not constitute "abusive, arbitrary, or oppressive government conduct." *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1009 (8th Cir. 1992); *see also Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) (noting that substantive due process claims should be limited to "truly irrational" governmental action). Appellees' investigation was

authorized by applicable federal and state law[9] and was proper because an agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

Even if we were to assume that Appellees' investigation of Gordon was motivated by malice, such facts would only give rise to a claim for malicious prosecution which is not punishable under section 1983, or *Bivens*, because it does not allege a constitutional injury. *See Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990). Moreover, we find that Appellees did not order the termination of Gordon's employment as general counsel with the Bank or as a partner with MNM & K; rather, Appellees merely prohibited Gordon from acting as an unlicensed executive officer, which Gordon had no legal right to do. Thus, Appellees' orders did not cause Gordon's claimed injury: loss of employment. These allegations fail to establish a causal link between the alleged wrongful action and deprivation and, therefore, fail to state a section 1983, or *Bivens*, claim for violation of Gordon's substantive due process rights. *See Madewell*, 909 F.2d at 1208.

We next turn to Gordon's procedural due process allegations.[10] Gordon essentially contends that Appellees denied him a fair hearing and the FDIC defendants, Jarvis

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[9] *See* 12 U.S.C. § 1820(c) (1994) (FDIC investigatory authority); Neb. Rev. Stat. §§ 8-103(1), 8-108 (1997) (the Department's investigatory authority).

[10] *See* notes 7-8 *supra* discussing Gordon's procedural due process allegations.

and Anderson, also violated his procedural due process rights by relying upon the Department's actions in bringing the FDIC action against Gordon when the FDIC defendants knew that the allegations against Gordon had no factual basis. We disagree.

To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. *See Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453, 1456 (8th Cir. 1996). Second, the plaintiff must prove that the defendant deprived him of such an interest without due process of law. *See id.* Although the Due Process Clause requires a fair and impartial tribunal, "[w]e begin with a presumption that decision-makers are honest and impartial." *Id.* at 1457.

In the present case, assuming that Gordon can establish a protected liberty interest in his employment and his right to engage in his profession without unreasonable governmental interference, the facts show that Gordon received the procedural safeguards that the Due Process Clause requires. Gordon availed himself of the administrative hearing process to contest the Emergency Orders and appealed the Department's orders to the District Court of Lancaster County, Nebraska. After a thorough review of Gordon's procedural due process allegations, we cannot say that the alleged combination of Hansen's investigating and judging functions constitutes a denial of procedural due process. *See Withrow v. Larkin*, 421 U.S. 35, 46-55 (1974); *Williams v. Day*, 553 F.2d 1160, 1163-64 (8th Cir. 1977) (an agency's familiarity with the facts of a case gained in performing its statutory role does not disqualify a decision maker); *Wilson v. Redevelopment*

Corp., 488 F.2d 339, 342-43 (8th Cir. 1973) (substantial prior involvement in a case is not sufficient to bar a person from acting as a decision maker). In this situation, the involved procedure did not create an unconstitutional risk of bias in the administrative adjudication, and Gordon has not overcome the presumption of honesty and integrity of his adjudicator. We, therefore, conclude that Gordon fails to state a procedural due process claim for which relief can be granted against the Appellees.

Similarly, we conclude that Gordon failed to state a procedural due process claim against the FDIC officials. The FDIC complied with the relevant statutory procedures for issuing its February 26, 1996 Notice and Order. *See* 12 U.S.C. § 1818(e), (i), (n) (1994); *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240-42, 248 (1988). Moreover, Gordon was entitled to request a hearing on the charges contained in the FDIC Notice and Order before these charges became effective. Therefore, we also dismiss with prejudice Gordon's remaining procedural due process claims against the FDIC for failure to state a claim upon which relief can be granted.[11]

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[11] We note that the district court dismissed without prejudice Gordon's procedural due process claims against the FDIC defendants because the FDIC administrative action had not yet concluded in Gordon's favor. *See Heck*, 512 U.S. at 486-87 (holding that when a section 1983 action that questions the validity of a criminal conviction is brought before the conviction has been overturned, the section 1983 action must be dismissed). We need not reach whether *Heck*'s rationale applies to the instant case – in that Gordon's section 1983 damages claim, brought before the merits of the underlying FDIC investigation is resolved in his favor, could result in conflicting adjudications – because we conclude that Gordon's allegations

Finally, because we find that Gordon's procedural due process allegations failed to state a claim upon which relief could be granted, we need not address the issue of whether Appellees are absolutely immune from personal liability for damages. We note, however, that Appellees would be entitled to absolute immunity from damages liability for the reasons expressed in the district court's memorandum and order. *See* J.A. at 278-79.

Likewise, because Gordon has failed to state either a substantive or procedural due process claim, Gordon cannot state a claim for a civil conspiracy. *See K & S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 980 (8th Cir. 1991) (Civil conspiracy "does not set forth an independent cause of action but rather is sustainable only after an underlying tort claim has been established.") (internal quotations and citations omitted).

III. CONCLUSION

Accordingly, for the reasons set forth above, we affirm the district court's dismissal with prejudice of Gordon's section 1983 substantive and procedural due process claims against Appellees. We also affirm the district court's dismissal of Gordon's remaining procedural due process claims against the FDIC officials regarding

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fail to state a procedural due process claim against the FDIC officials.

the FDIC administrative proceedings but conclude that this dismissal should be with prejudice.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 97-3657NEL

Richard L. Gordon, Appellant, vs. James A. Hansen; Lucinda Glen; Kent Plummer; Richard Anderson; Richard Jarvis, Appellees.	*	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

May 17, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit